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No. 00-1649

In The

Supreme Court of the United States

COUNTY OF HUMBOLDT, *et al.*,

Petitioners,

v.

HEADWATERS FOREST DEFENSE, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

1. Whether a reasonable jury could conclude based on an extensive trial record that law enforcement officers' use of pepper spray that caused excruciating pain to passive demonstrators who presented no danger to themselves or others constituted an unreasonable use of force under this Court's well-established balancing test in *Graham v. Connor*.

2. Whether the presence of extensive, disputed historical facts in this case precludes the resolution of qualified immunity claims prior to the fact finder's resolution of those material facts.

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Respondents agree that the list of parties presented in the petition (Pet. at ii) is accurate and complete.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Headwaters Forest Defense, *et al.* (collectively, "demonstrators"), respectfully request that this Court deny the petition for writ of certiorari seeking review of the decision of the United States Court of Appeals for the Ninth Circuit in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to U.S. CONST. amend. IV and 42 U.S.C. § 1983, cited by Petitioners, this case also involves FED. R. CIV. P. 50, which states in pertinent part:

> "(a)(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim . . . that cannot under controlling law be maintained or defeated without a favorable finding on that issue."
>
> "(b) . . . The movant may renew its request for judgment as a matter of law by filing a motion not later than 10 days after entry of judgment and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may: . . . (2) if no verdict was returned: (A) order a new trial, or (B) direct entry of judgment as a matter of law."

STATEMENT OF THE CASE

Nine environmental demonstrators brought an action under 42 U.S.C. § 1983, alleging that law enforcement officers violated their Fourth Amendment rights through

the use of unreasonable, excessive force while arresting the demonstrators for trespass during three peaceful protests. Although the demonstrators were immobilized and posed no threat to themselves or others, officers deliberately swabbed oleoresin capsicum (sometimes called "OC" or "pepper spray") onto the demonstrators' eyelids, sprayed OC into their faces from inches away, and in at least one instance, swabbed OC directly onto a demonstrator's open eyeball.

Significant factual issues in the case remain disputed, but no judge or jury has yet resolved them. After granting summary judgment to all individual line officers on qualified immunity grounds, the district court set the case for trial against petitioners Humboldt County, the City of Eureka, Sheriff Dennis Lewis and Chief Deputy Sheriff Gary Philp, the two supervisory officials directly responsible for authorizing the use of OC on passive demonstrators. At the close of plaintiffs' case-in-chief, the district court ruled that Lewis and Philp were also entitled to qualified immunity as a matter of law and dismissed them. After a nine-day trial, the jury deadlocked with regard to the claims against the City and County. The district court declared a mistrial and set a new trial date. Shortly before that date, however, the district court entered judgment as a matter of law for the remaining defendants pursuant to FED. R. CIV. P. 50. The demonstrators appealed the dismissal of their claims against only Humboldt County, the City of Eureka, Sheriff Lewis, and Chief Deputy Sheriff Philp.

After meticulously reviewing the extensive factual record, the Ninth Circuit concluded that there was sufficient evidence for a rational jury to reach a verdict in favor of the plaintiff demonstrators, and remanded to the district court for a new trial. (Pet. App. A at 33a, 39a). As required in a review of a Rule 50 judgment, the Ninth

Circuit viewed the evidence in the light most favorable to the plaintiffs, the non-moving parties, but did not resolve any of the many fact disputes. (Pet. App. A at 16a); *see Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-51 (2000). The court of appeals observed that the district court's decision improperly failed to honor these standards and was "replete with assertions that the weight of the evidence favors the defendants and with conclusions that the court reached by resolving conflicts in the evidence *against* the nonmoving parties." (Pet. App. A at 16a). Finally, in ordering a new trial, the Ninth Circuit relied on what all parties agree is the controlling legal standard that governs this case, the fact-specific balancing test in *Graham v. Connor*, 490 U.S. 386 (1989).

The Ninth Circuit also held that genuine disputes over historical facts precluded the dismissal on qualified immunity grounds of Sheriff Lewis and Chief Deputy Sheriff Philp, the two individual officials who authorized this unprecedented use of OC. The demonstrators had not appealed the dismissal of the several other individual officers.

Humboldt County, the City of Eureka, Sheriff Lewis, and Chief Deputy Philp (collectively, "County") now ask this Court to review the Ninth Circuit's order granting the demonstrators an opportunity to try this fact-intensive case to a jury.

The demonstrations that form the background of this case were intended to make the public aware of the logging of ancient redwood trees in the Headwaters Forest, along California's northern coast.[1] The

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[1] Plaintiffs Spring Lundberg, Eric Neuwirth, Molly Burton, and Jennifer Schneider along with three non-plaintiffs participated in a September 25, 1997 protest at the office of Pacific Lumber Company, sometimes referred to in the record as

demonstrations, though they may have inconvenienced a small number of people, were harmless, symbolic acts. The most serious crime with which the demonstrators were ultimately charged was misdemeanor trespass. (Pet. App. A at 29a). Throughout these events, the demonstrators were immobile, peaceful, and non-threatening. Pacific Lumber Video; Riggs Video; Bear Creek Video (collectively, "Videos"). The demonstrations occurred in several places related to the controversy: a Congressman's office; the office of Pacific Lumber, the logging company involved; and a remote logging site called Bear Creek, where two young men locked themselves between the treads of a bulldozer used by Pacific Lumber to rip logging roads. *E.g.*, ER 3-568-569; Riggs Video; ER 3-665; Pacific Lumber Video; ER 2-344; Bear Creek Video. The majority of the demonstrators were young people – two were under eighteen. ER 2-295 (Lundberg); ER 5-1214 (Portugal).

As in many other symbolic protests, the demonstrators used harmless props, signs, and humor to help send their message. For example, they carried sawdust, a tree stump, and a pumpkin into the protest at the Congressman's office. ER 3-568-569.

At each location, the demonstrators also sat or knelt and linked themselves together – in groups ranging from two to seven – with contraptions that, while in use, immobilized their arms and prevented them from moving around. *E.g.*, Videos; ER 2-345-346 (Tendick). The contraptions, nicknamed "black bears," made it difficult,

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the "Scotia protest." Plaintiffs Michael McCurdy and Noel Tendick locked themselves to the treads of a Pacific Lumber bulldozer on October 3, 1997. Plaintiffs Terri Slanetz, Lisa Sanderson-Fox, Maya Portugal and Jennifer Schneider participated in a peaceful demonstration in a Congressman's office on October 16, 1997.

but not impossible, to separate the demonstrators involuntarily. ER 2-459-463 (Held); Pacific Lumber Video (using tools to separate takes 8 minutes); ER 6-1365 (Daastol-officer's testimony that he had removed "approaching a hundred" demonstrators from such devices). Though they may have committed misdemeanors in the course of these acts of civil disobedience, the demonstrators were at no time endangering themselves or others.

What sets these demonstrations apart from so many others is the government's response. In each of the incidents at issue in this case, law enforcement officers ordered the demonstrators to unlink and leave. When the demonstrators did not comply, the officers applied OC in a manner that caused the chemical to come into direct contact with the demonstrators' eyes, noses, mouths, and skin.

Oleoresin capsicum is a chemical agent designed to cause intense, burning, debilitating pain when sprayed toward attackers. *E.g.*, ER 2-225-226 & 2-230 (Hanson). Police and prison guards use OC, spraying it from several feet or yards away to quickly disable aggressive, violent inmates or criminals. *E.g.*, ER 2-230, 2-238 (Hanson); ER 2-494 (Lewis). Even applied from a distance, the chemical can quickly immobilize and disorient large, belligerent attackers or wild animals such as bears. *E.g.*, ER 2-230-231, ER 2-478-479 (Held).

In this case, law enforcement officers applied OC directly to the eyes of the immobile demonstrators. First, the officers forced the demonstrators' faces upward by pulling their heads or hair backwards. *E.g.*, ER 3-571 (Fox-head held against officer's thigh); Riggs Video; ER 3-632 (Burton-describing Lundberg); ER 3-607 (Neuwirth); Pacific Lumber Video; ER 5-1064-1066 (Slanetz); Riggs Video. Then, the officers used Q-tips soaked with

OC to swab the chemical *directly* onto the demonstrators' closed eyes. *E.g.*, ER 2-293-294 (Lundberg); ER 3-608 (Neuwirth). In at least one instance, as one of the demonstrators moaned, "Ow! Don't open it!," an officer swabbed the chemical directly onto the surface of her eyeball. ER 3-675-676 (Schneider); Riggs Video; Trial Exhibit 85.4 (blowup of Schneider's eyeball at time of application). At least three times, officers sprayed the chemical – from inches away – directly onto the eyes of demonstrators, until it ran from the demonstrators' eye sockets. Riggs Video; Bear Creek Video; ER 4-971 (McCurdy); ER 5-1066 (Slanetz). The chemical quickly seeped into eyeballs, into noses and mouths, and onto other parts of the demonstrators' faces and bodies. *E.g.*, ER 3-668 (Schneider); ER 2-352 (Tendick).

Applied directly to the eyelids and eyes of the demonstrators and seeping or running into their noses and mouths and onto other parts of their bodies, the chemical inflicted terrible pain, as the officers knew it would. *E.g.*, ER 5-1063 (Slanetz-officer said "Let your friends know what this feels like."); ER 4-839 (Kirkpatrick). The jury heard testimony that the demonstrators screamed in pain and begged the officers to stop hurting them. *E.g.*, ER 5-1064 (Slanetz screamed); ER 5-1066 (Slanetz pleaded). A 17-year old woman, plaintiff Spring Lundberg, described the initial impact of the OC on her:

> Q: WHAT WAS THE IMPACT? WHAT DID THAT FEEL LIKE ON YOUR EYES?
>
> A: AT FIRST IT WAS JUST WET, AND I WAS SO SCARED. AND THEY WERE PULLING MY HEAD BACK AND SWABBING MY EYE, AND I WAS JUST TRYING TO BREATHE. AND THEN IT STARTED BURNING AND MORE – BURNING MORE AND MORE BURNING. IT FELT LIKE PRETTY SOON I WOULDN'T HAVE ANY SKIN LEFT ON MY

> EYES. AND AROUND MY EYES, THERE WAS SO MUCH PAIN, THE MOST PAIN I'VE EVER FELT.

ER 2-293 (Lundberg). The ensuing shock and the chemical itself made it difficult for the demonstrators to breathe. *E.g.*, ER 2-293-294 (Lundberg); ER 3-609 (Neuwirth); ER 3-668-669 (Schneider); ER 4-970-971 (McCurdy). Moreover, the OC caused pain that lasted long after the application and several hours after the protests ended. ER 5-1067 (Slanetz-too painful to open eye hours after application); ER 2-294 (Lundberg); ER 2-355, 2-359 (Tendick-continued pain, eyes inflamed for hours).

The record also includes evidence that the demonstrators experienced prolonged emotional and psychological injuries from the harm the OC inflicted. *E.g.*, ER 2-296 (Lundberg-panic attacks); ER 3-577-578 (Sanderson-Fox-emotionally fragile, cries frequently for no reason); ER 3-616 (Neuwirth-depressed, emotional all the time, feelings of being violated); ER 3-635-636 (Burton-fear and sadness, nightmares); ER 5-1068 (Slanetz-emotionally sensitive, nightmares, less trusting, fear of police).

In contrast to this evidence about the significant bodily intrusions and emotional harm, there is little evidence to support the County's purported justifications for its use of OC to induce pain on the immobilized demonstrators. The demonstrators' actions appear to have caused, at most, mild inconvenience at the three sites. ER 3-602 (Neuwirth-Pacific Lumber secretary "vaguely amused" by demonstration); ER 5-1059-1060 (Slanetz-Congressman's staff initially "annoyed" but later took photographs for Congressman's scrapbook). The trial evidence showed that the demonstrators were nonviolent and unarmed and that they posed no safety threat to themselves or others. (Pet. App. A at 6a, 7a, 10a, 27a, 28a, 32a); *E.g.*, Videos; ER 2-283 (Lundberg); ER 2-381 (Tendick). There was no evidence of any damage to property

at any of the protests. Thus, nothing in the record indicates that the charged misdemeanors endangered anyone's safety or property.

Finally, the demonstrators presented evidence that the County's use of OC was both unnecessary and ineffective. (Pet. App. A at 30a-32a); Videos. OC often did little or nothing to expedite the arrests of the demonstrators and may actually have prolonged some of those arrests. In several cases, the OC did not induce the demonstrators to release themselves from the black bears. Pacific Lumber Video; Bear Creek Video. In those cases, the officers carried the demonstrators from the site and/or ended up quickly cutting them out with grinders. Pacific Lumber Video; ER 3-613 (Neuwirth); ER 2-462 (Held); Bear Creek Video; ER 2-353-354 (Tendick).

The County argues in support of its qualified immunity claim that officers consulted with various experts about this unique use of OC before they actually used it, but this fact is actually in dispute. Although some evidence suggests that officers consulted about applying OC to demonstrators' cheekbones, the evidence does not show that the officers consulted on what they actually did – swabbing OC directly onto the stretched eyelids and open eyeballs of the demonstrators and delivering full blasts of OC into their closed eyes from inches away. ER 3-724, 3-729 (Risk Manager Kerr-discussed application below eye, on cheekbone; no discussion of full spray); ER 3-315 (Tendick-steady spray directed into eyes); ER 5-1009, ER 5-1101 (Officer Manos-attempted to open clenched eyes slightly to allow OC to enter; goal to get OC into eye); ER 3-674-676 (Schneider-OC swabbed onto open eyeball); Trial Exhibit 85.4 (blowup of Schneider's eyeball at time of application). Although there is some evidence that County officials were so concerned about their potential *criminal* liability for their use of OC in this

context that they consulted the local District Attorney, the District Attorney recommended that they secure a separate and independent opinion on their potential civil liability exposure. ER 3-507 (Lewis-went to DA because concerned about criminal prosecution); 5-993, 5-998 (Philp-criminal liability of officers a possibility; personally concerned that full spray would cause more effect than might be reasonable); (Pet. App. A at 37a). What is more, these officials knew that the California Highway Patrol specifically prohibits the use of OC in the manner in which the officers used it on the demonstrators. ER 3-518 (Lewis).

REASONS FOR DENYING THE WRIT

Notwithstanding the County's characterization of this case as having "far-reaching implications" for Fourth Amendment law and qualified immunity, this case actually involves a rather mundane application of FED. R. CIV. P. 50. The issue is whether the plaintiff demonstrators have presented sufficient evidence to have their claims resolved by a jury. The unresolved questions at this point in the case, including the degree and nature of the harm suffered by the demonstrators and the governmental interest at stake, are questions of fact. As the Ninth Circuit correctly observed, "[w]e are not asked to decide whether the use of pepper spray in this case constituted excessive force or not. We are only to decide whether the district court erred in directing a verdict for the defendants in light of the evidence in the record." (Pet. App. A at 22a n.8).

I.

THIS CASE PRESENTS NO IMPORTANT ISSUES OR CONFLICTS OF LEGAL AUTHORITY REGARDING FOURTH AMENDMENT LAW AND IS THEREFORE NOT WORTHY OF THIS COURT'S REVIEW.

A. IN ITS PRESENT PROCEDURAL POSTURE, THIS CASE CENTERS AROUND THE APPLICATION OF WELL-ESTABLISHED FOURTH AMENDMENT LAW TO THE EXTENSIVE AND DISPUTED FACTUAL RECORD.

There is no dispute about the controlling legal standard in this case. The parties agree that the well-established *Graham v. Connor* reasonableness standard for excessive force claims governs the demonstrators' claims. 490 U.S. 386, 396 (1989) (citing *Tennessee v. Garner*, 471 U.S. 1, 8 (1985), quoting *United States v. Place*, 462 U.S. 696, 703 (1983)). There is also no dispute that the *Graham* standard requires a "careful balancing of 'the nature and the quality of the intrusion on the individual's Fourth Amendment interests' " against "the countervailing governmental interests at stake." *Id.*

What is firmly in dispute, and the subject of voluminous evidence, are the key fact issues that inform the application of *Graham*: the nature and quality of the County's intrusion on the demonstrators and the extent of the governmental interests asserted as justifications for the use of pain-inducing OC. There are many disputes about what inferences a fact finder should draw from the record evidence and what weight should be given to particular pieces of evidence. Indeed, as the Ninth Circuit noted, the district court inappropriately drew such inferences, weighed evidence, and resolved conflicting material facts in favor of the County, the party that moved for judgment as a matter of law. (Pet. App. A at 16a). *Cf. Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133,

150-51 (2000) (" 'Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge' ") (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

The County believes it inflicted no actionable injury on the demonstrators and that it has offered evidence that supports this view. The demonstrators assert the evidence shows that they suffered severe physical injuries, excruciating pain and suffering, and emotional harm. The County believes the evidence shows the governmental interest at stake was enormous; the demonstrators believe their evidence shows that it was minimal. As the Ninth Circuit properly held, the resolution of those issues should take place before a jury.

To transform this case from one raising the mundane question of whether a district court correctly applied FED. R. CIV. P. 50 to one raising questions of constitutional significance, the County has simply asserted that its version of the facts is correct, in essence trying the facts to this Court. Specifically, the County assumes that the excruciating pain caused by its use of OC constituted "minimal" or "de minimus" force and that it caused "no physical injury." (Pet. at 13). As the Ninth Circuit recognized, however, the factual basis for each of these claims is itself in dispute.

Accordingly, the County's petition is based not on the importance of the Fourth Amendment issues, but on its disagreement with the demonstrators' evidence and with the Ninth Circuit's application of the well-established *Graham* standard to the disputed factual record. As such, this case is ill-suited for review by this Court. *See* SUP. CT. R. 10 (petitions rarely granted when asserted error involves "erroneous factual findings or the misapplication of a properly stated rule of law").

Because this dispute is one of fact, not law, a decision by this Court would not provide additional, meaningful guidance to lower courts beyond the existing analytical framework already established in *Graham*. This case therefore simply does not warrant review.

B. THE NINTH CIRCUIT PROPERLY APPLIED THE *GRAHAM* BALANCING FACTORS IN REVIEWING WHETHER THERE WAS SUFFICIENT EVIDENCE UPON WHICH A REASONABLE JURY COULD CONCLUDE THAT THE COUNTY'S USE OF PEPPER SPRAY VIOLATED THE FOURTH AMENDMENT.

The petition should also be denied because the Ninth Circuit properly decided this case under existing legal authority. Review would require this Court to unnecessarily replicate the Ninth Circuit's careful analysis of the evidentiary record, of which the trial transcript alone comprised over 1000 pages.

This Court has held that the Fourth Amendment's "objective reasonableness" standard "governs a free citizen's claim that law enforcement officials used excessive force in the course of making an arrest. . . . " *Graham v. Connor*, 490 U.S. 386, 388 (1989). *Graham* requires a "careful balancing of 'the nature and the quality of the intrusion on the individual's Fourth Amendment interests' " against "the countervailing governmental interests at stake." *Id.* at 396 (citing *Tennessee v. Garner*, 471 U.S. 1, 8 (1985), quoting *United States v. Place*, 462 U.S. 696, 703 (1983)). "[T]he essence of the *Graham* objective reasonableness analysis" is that "[t]he force which was applied must be balanced against the *need* for that force." *Liston v. County of Riverside*, 120 F.3d 965, 976 (9th Cir. 1997) (quoting *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1367 (9th Cir. 1994), *cert. denied*, 513

U.S. 1083 (1995)); *see also Ikerd v. Blair*, 101 F.3d 430, 434 (5th Cir. 1996).

Graham made at least two things clear about its "objective reasonableness" standard. First, the test does not require plaintiffs to show that they suffered any particular type of injury or that the amount of force exceeded any minimum threshold in order to prevail. Rather, the test requires that in each case the court must examine the government's need for force relative to the harm caused by that force. The force an officer may use against someone attacking him with an axe is much greater than the force an officer may use when trying to obtain a blood sample from someone suspected of committing a misdemeanor. *Compare Schulz v. Long*, 44 F.3d 643, 646 (8th Cir. 1995) (plaintiff attacking with ax shot by officer) *with Hammer v. Gross*, 932 F.2d 842, 846 (9th Cir.) (district court did not err in denying directed verdict in blood draw case), *cert. denied*, 502 U.S. 980 (1991). Where the governmental interest is minimal or non-existent, the harm that a plaintiff must show to prevail is not as great. *See Thornton v. City of Macon*, 132 F.3d 1395, 1400 (11th Cir. 1998) (in arrest lacking probable cause "officers were not justified in using any force"); *P.B. v. Koch*, 96 F.3d 1298, 1303 n.4, 1303-04 (9th Cir. 1996) (where no need for force, minimal force is a violation). Thus, there can be no requisite minimum level of harm, because what, if any, force is reasonable varies greatly according to the circumstances.[2]

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[2] The County appears to urge the Court to promulgate a general rule that an excessive force plaintiff must show that government officials have inflicted a physical wound of some sort. (Pet. at 13-14). Such a general rule would conflict with *Graham*'s mandate to balance the intrusion on a citizen's rights against the governmental interest at stake. Worse, such a rule would also allow law enforcement officers to inflict enormous pain on a citizen through methods such as electric shock or OC,

See, e.g., Bass v. Robinson, 167 F.3d 1041, 1046 n.1 (6th Cir. 1999) (extent of injury inflicted is not crucial to analysis of excessive force claim); *Bibum v. Prince George's County*, 85 F.Supp.2d 557, 562-64 (D. Md. 2000) (rejecting de minimus injury requirement for excessive force claims).

Second, the *Graham* test clearly requires an individualized fact inquiry. The "reasonableness" standard is not a test "capable of precise definition or mechanical application." *Graham*, 490 U.S. at 396 (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)). "[I]ts proper application requires careful attention to the facts and circumstances of each particular case." *Graham*, 490 U.S. at 396. The *Graham* test requires a factfinder to analyze the "totality of the circumstances" surrounding a particular arrest. *Id.* (quoting *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985)); *see also Franklin v. Foxworth*, 31 F.3d 873, 876 (9th Cir. 1994) (inquiry may include specific *Graham* factors and whatever specific factors appropriate in particular case).

Because *Graham* requires a fact inquiry, courts have consistently found that the question of whether government officials used excessive force is ordinarily one for the jury. *See, e.g., Abraham v. Raso*, 183 F.3d 279, 289-90 (3rd Cir. 1999); *Bass v. Robinson*, 167 F.3d 1041, 1046 (6th Cir. 1999); *Liston*, 120 F.3d at 976 n.10; *Quezada v. County of Bernalillo*, 944 F.2d 710, 715 (10th Cir. 1991); *Calamia v. City of New York*, 879 F.2d 1025, 1035 (2nd Cir. 1989). No jury has yet resolved the facts of this case. The district court's entry of a Rule 50 judgment precluded the demonstrators' opportunity to have a jury weigh the evidence of the degree of intrusion to the demonstrators' Fourth

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as long as inflicting that pain left no marks, and regardless of whether there was any legitimate governmental justification. Such a general rule would also ignore the fact that a person is quite obviously harmed when subjected to severe, agonizing pain.

Amendment rights, evaluate the evidence on the government's interests, assess the credibility of the material witnesses, or conduct the *Graham*-mandated balancing.

1. A Reasonable Jury Could Find, Based on the Extensive Trial Record, That Officers Severely Intruded on the Demonstrators' Fourth Amendment Rights by Inflicting Excruciating and Debilitating Pain and Emotional Distress.

Graham requires courts adjudicating excessive force claims to assess the " 'nature and quality of the intrusion' " occasioned by the police's particular use of force. *Graham*, 490 U.S. at 396 (citing *Tennessee v. Garner*, 471 U.S. 1, 8 (1985), quoting *United States v. Place*, 462 U.S. 696, 703 (1983)). Here, there is overwhelming evidence in the record from which a jury could conclude that the officers' use of OC on the demonstrators inflicted a severe intrusion on their Fourth Amendment rights.

Ample evidence demonstrating the nature of the intrusion caused by OC use was presented to the jury. As the Ninth Circuit observed, one County witness testified that OC is "*designed* to cause intense pain, a burning sensation that causes mucus to come out of the nose, an involuntary closing of the eyes, a gagging reflex, and temporary paralysis of the larynx." (Pet. App. A at 21a); *see* ER 2-235-236 (Hanson). *Cf. United States v. Neill*, 166 F.3d 943, 949 (9th Cir.) (holding that pepper spray constitutes a dangerous weapon capable of inflicting death or serious bodily injury for purposes of U.S. Sentencing Guidelines), *cert. denied*, 526 U.S. 1153 (1999).

In different contexts, OC may cause varying degrees of impact. In this case, however, there is substantial evidence to support the demonstrators' claims that the quality of the intrusion on them was extreme. The trial transcript is filled with testimony from the demonstrators

detailing the manner in which the officers applied OC to their eyes and faces and about the direct impact of that application. The evidence shows that OC applications caused blinding, "agonizing," and "searing" pain that lasted for hours. *E.g.*, ER 2-293-294 (Lundberg); ER 7-354-355 (Tendick); ER 5-1063-1065 (Slanetz); ER 5-1228-1229 (Portugal). As one demonstrator testified, "At first, it was just burning, then it got gradually worse and worse, and my eyes started tearing, and it was going down my face and burning where it went." ER 5-1228-1229 (Portugal). Another testified, "It immediately was just raging pain, and it immediately – I couldn't breathe, and I just went into I guess a state of basic life survival, panic, and I kept knocking my head against the stump because the pain was just excruciating." ER 3-674-676 (Schneider). The County's use of OC also impaired the demonstrators' breathing and caused them to hyperventilate. *Id.*; ER 2-293-294 (Lundberg); ER 3-609 (Neuwirth); ER 4-970-971 (McCurdy).

What is more, a reasonable jury could conclude that the County's use of OC was calculated to have maximum impact. The record details the unorthodox and direct manner in which the officers applied OC. As described above, in some instances the officers: forced the demonstrators' faces upward by pulling their heads or hair backwards; used Q-tips soaked with OC to swab the chemical onto the demonstrators' eyelids; swabbed the chemical directly onto the surface of a demonstrator's eyeball; and sprayed the chemical from inches away directly onto demonstrators' eyes until it ran from the demonstrators' eye sockets, causing OC to quickly seep into eyeballs, noses and mouths, and onto other parts of the demonstrators' faces and bodies. *See supra* at p. 5-6. This was done in spite of the fact that the County's deputy in charge of chemical agent training testified that

spraying OC into a person's face from less than 3 feet is not safe. ER 2-275-276 (Hanson). There was also evidence that demonstrators experienced emotional and psychological injuries from the harm the OC inflicted. *See supra* at p. 7. Such injuries are clearly cognizable in § 1983 actions. *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 306-07 (1986) (damages for § 1983 claims may include mental anguish and suffering).

The County officials clearly understood that the OC would have these effects. ER 3-673-674 (Schneider-during Riggs protest, officer said "Jennifer, haven't you told your friends what we're going to do to you today?"); ER 5-1063 (Slanetz-officer said "Let your friends know what this feels like."). In conjunction with this testimony, there is also conflicting evidence whether officers used hand-held water spray bottles to relieve the intensity of the demonstrators' pain or whether this use actually increased the severity of the intrusion by causing the OC to spread to demonstrators' mouths and noses. ER 3-669-670 (Schneider); (Pet. App. A at 23a).

The Ninth Circuit thoroughly examined this evidence and concluded that there was undoubtedly sufficient evidence presented in this case to take it to a jury and from which a jury could find a cognizable intrusion on the demonstrators' Fourth Amendment rights. Given this Court's admonition that in Rule 50 motions, "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence," *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000), the Ninth Circuit's decision was entirely appropriate and review of this case is unwarranted.

2. A Reasonable Jury Could Find, Based on The Extensive Trial Record, That the County's Interests, If Any, Were Outweighed by the Intrusion on the Demonstrators.

Graham identified three items that a factfinder should consider when determining whether the government's use of force was reasonable: 1) "the severity of the crime at issue"; 2) "whether the suspect poses an immediate threat to the safety of the officers or others"; and 3) "whether he is actively resisting arrest or attempting to evade arrest by flight." 490 U.S. at 396.[3] The factors all concern the government's need to use force in a particular situation. *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1367 (9th Cir. 1994), *cert. denied*, 513 U.S. 1083 (1995); *Spann v. Rainey*, 987 F.2d 1110, 1115 (5th Cir. 1993).

The Ninth Circuit's decision carefully walks through each of the County's possible justifications for the use of OC on the peaceful demonstrators. (Pet. App. A at 25a-31a). On each point, the court properly concluded that a reasonable jury could find that the evidence did not support the County's arguments about the necessity for use of pain-inducing chemical agents to effect the demonstrators' arrests. This conclusion is particularly defensible in light of this Court's statement that "although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 151 (2000).

1. There was evidence of the ineffectiveness of OC in advancing the County's purported interest in the arrest

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[3] The three factors listed in *Graham* are not exclusive, but provide a convenient framework to discuss the evidence in this case.

and quick removal of the demonstrators. Indeed, the record showed that while the officers inflicted great pain when they applied OC, the use of the chemical agent did little or nothing to expedite the arrest of the demonstrators. Pacific Lumber Video (separating with tools takes about 8 minutes); ER 3-613 (Neuwirth); ER 2-462 (Held-7 or 8 minutes to cut contraption). Similarly, the officers used OC to inflict great pain on the demonstrators locked to the bulldozer, but a jury could reasonably conclude that using OC actually prolonged the actual arrest, because the demonstrators who had OC applied to them did not unlink and were ultimately safely separated with a grinder and removed from the site. Bear Creek Video; ER 2-353-354 (Tendick). At the demonstration at the logging site, the officers waited half an hour for a videographer to arrive before even applying the OC, and one officer said that they had "all day to do this." Bear Creek Video.

2. The Ninth Circuit properly rejected the district court's conclusion that the County had a substantial interest in preventing organized lawlessness by a large group of demonstrators. (Pet. App. A at 26a-27a). The largest protest involved only seven individuals. Pacific Lumber Video. The County relies on its own officers' speculation that other demonstrators may have been hiding in the woods near the Bear Creek demonstration. As the Ninth Circuit observed, however, "there is no evidence that a large, lawless group was anywhere in sight." (Pet. App. A at 26a). At most, this represents conflicting evidence on a material fact.

3. A reasonable jury considering the *Graham* factors could also find that the demonstrators posed absolutely no threat – "immediate" or otherwise – to anyone. The demonstrators were nonviolent and unarmed. Videos;

(Pet. App. A at 27a). There is no evidence that any demonstrator threatened the officers or anyone else. On the contrary, there is evidence that the demonstrators smiled at and talked with the officers on the scene. ER 5-1061 (Slanetz). Videotapes of the demonstrations show that, far from being a threat, the demonstrators were the most vulnerable people present. Videos. When they linked themselves together, the demonstrators were immobilized and had surrendered all capacity to defend themselves. *Id.* In all three protests, the officers completely surrounded the demonstrators. *Id.* The demonstrators' vulnerability is underscored by the relative ease with which the officers placed OC onto their eyes. Videos.

For the same reasons, a jury could reasonably find that no plaintiff was "actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. In fact, during the demonstration in the Congressman's office, the demonstrators were not only immobilized, but also had been locked into the office by the Congressman's staffer. ER 5-1059 (Slanetz).

4. The record likewise does not support the County's claims that its actions were justified by any exigencies. As the Ninth Circuit pointed out, the only exigency the officers testified about was the demonstrators' use of the "black bear" devices to immobilize themselves. (Pet. App. A at 29a). But the evidence showed that before the officers even arrived at the scenes of the demonstrations, the County had decided to use OC indiscriminately on any demonstrator using a lock-down device. ER 4-483 (Lewis); (Pet. App. A at 6a, 29a). A reasonable jury reviewing this evidence could surely disbelieve the County's assertion of an emergency. *Reeves*, 530 U.S. at 151 (courts reviewing Rule 50 motions must disregard all evidence favorable to the moving party that the jury is not required to believe).

5. A jury could reasonably view *Graham*'s "severity of the crime" prong as minimal in this case. The demonstrators were ultimately charged with misdemeanors, not felonies.[4] *See Hammer v. Gross*, 932 F.2d 842, 846 (9th Cir.) (noting misdemeanors less severe than felonies in analyzing Fourth Amendment violation), *cert. denied*, 502 U.S. 980 (1991). Even the trespasses associated with the demonstrations did not appear to cause great disruption. There is evidence that during the protest at Pacific Lumber's office, the secretary was "vaguely amused." ER 3-602 (Neuwirth). At the Congressman's office, the staff was initially "annoyed" but later took photos of the demonstration "for the Congressman's scrapbook." ER 5-1059-1060 (Slanetz). There was also evidence that the Congressman's staff was "walking around" and "answering the phone and talking." ER 5-1065 (Slanetz). There is no evidence that the young men chained to the bulldozer's tread injured the bulldozer or anything else. In light of the incomparably more horrifying and violent crimes that our society experiences each day, a juror could reasonably conclude the demonstrators' "crimes" were not at all severe.

6. A jury might reasonably consider evidence that the officers had declined to use other more effective and less painful alternatives to arrest the demonstrators as evidence of the need, or lack thereof, for the government to use OC. The demonstrators presented evidence that

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[4] The district court found that the government had an interest in "protecting the property rights of lawful occupants." (Pet. App. B at 47a); ER 6-1419-1420. This element is included in *Graham*'s "severity of the crime" factor. As discussed in the text, there was evidence from which a jury could infer, contrary to the district court's determination, that the intrusion on property rights was minimal. There was no evidence of any damage to property at any of the protests.

officers could and did use tools to unlink them. Pacific Lumber Video; ER 2-465-467 (Held-acknowledging fire risk from tools can be mitigated); ER 4-813 (no fire danger present at Pacific Lumber); ER 6-1270-1271 (Reynolds-past use of grinders did not cause serious injury or fire). That the County disagrees with this evidence is not a ground for preventing this case from going to trial.

7. Finally, in the face of minimal evidence supporting the County's purported justifications for using OC, the demonstrators presented evidence from which a jury could reasonably conclude that the government did not need to use OC to effect an arrest of the demonstrators, but rather used it to punish the demonstrators for protesting. *E.g.*, ER 5-1063 (Slanetz-officer said "Let your friends know what this feels like."). That evidence could also be reasonably read in the context of other evidence that the County's unique use of OC on the demonstrators in this case was not a standard police technique. Swabbing OC onto the eyes of demonstrators was something new, not a practice used anywhere else in the United States. ER 3-518 (Lewis). There was evidence that the California Highway Patrol specifically prohibits the use of OC in the manner in which the officers used it on the demonstrators. *Id.* A reasonable jury could plausibly conclude from such evidence that it should give little credence or weight to the government's asserted need to use OC. Moreover, because the OC use was ineffective, a jury could reasonably conclude that its use was designed to punish the demonstrators rather than to secure their arrests.

In sum, on the factors mentioned in *Graham* a reasonable jury could conclude from all or parts of this evidence that the general governmental interest at stake in this case was minimal, and that the governmental interest in using OC was even less. The "severity of the crime" was

low, and a jury could rationally conclude that the demonstrators posed absolutely no risk of violence or flight.

II.

THE PRESENCE OF EXTENSIVE, DISPUTED HISTORICAL FACTS SOMETIMES PRECLUDES THE RESOLUTION OF QUALIFIED IMMUNITY CLAIMS PRIOR TO THE FACT FINDER'S RESOLUTION OF SUCH FACTS.

The County mischaracterizes the holding of the Ninth Circuit in this case, suggesting without foundation that the court's decision is tantamount to the categorical elimination of qualified immunity defenses in all excessive force cases. (Pet. at 21-22). The County is twice mistaken. First, the appellate court's decision does not in any way reject the applicability of qualified immunity in *all* excessive force cases. Second, the opinion does not even foreclose the possibility of qualified immunity being applied to these defendants at the new trial in *this case*.

As required by Supreme Court precedent, the Ninth Circuit's decision analyzed the individual defendants' qualified immunity claims in light of the clarity of the underlying Fourth Amendment law of excessive force. (Pet. App. A at 34a). The Ninth Circuit pointed out that under this Court's controlling precedent:

> For a right to be "clearly established," its "contours . . . must be sufficiently clear that [at the time the allegedly unlawful action is taken] a reasonable official would understand that what he is doing violates that right." *[Mendoza v. Block*, 27 F.3d 1357,] . . . 1361 [(9th Cir. 1994)] (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)) (alternation [*sic*] in original). Although plaintiffs need not show that the very action challenged was previously held unlawful, they must show that

> " 'in the light of pre-existing law the unlawfulness must be apparent.' " *Id.* (quoting *Anderson*, 483 U.S. at 640, 107 S.Ct. 3034).

(Pet. App. A at 34a). While recognizing that qualified immunity is generally a question of law, the decision correctly concludes that because of the high level of factual dispute over historical events in this case, the trial court erroneously granted qualified immunity as a matter of law at this stage of the litigation. (Pet. App. A at 33a, 36a-39a).

This conclusion precludes the application of qualified immunity neither in all excessive force cases nor in this case. The qualified immunity defense is available at many different stages of litigation. *See Behrens v. Pelletier*, 516 U.S. 299, 307 (1996) (allowing multiple interlocutory appeals from district court denials of qualified immunity claims at various stages of pretrial litigation). Although one of the principal functions of the defense is to provide for early termination of insubstantial claims, *Saucier v. Katz*, No. 99-1977, slip op. at 5 (U.S. June 18, 2001), such termination is not always available where genuine issues of historical fact exist. *See* Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 90-98 (1997). This Court has always urged early resolution of qualified immunity claims *where possible*. *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987) (acknowledging that if plaintiff's alleged facts differ from defendant's version of the facts for purposes of assessing defendant's reasonableness, discovery may be necessary before qualified immunity can be adjudicated).[5]

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[5] Qualified immunity serves other goals in addition to limiting the litigation burdens imposed on public officials by civil rights claims. Promoting fairness and ensuring against inhibiting public officials from performing their duties are also

Thus, the preclusion of qualified immunity review in this particular case is a function not of the Ninth Circuit's framing of the legal question, but of the sometimes fact-intensive nature of qualified immunity analysis under the Court's prevailing reasonableness standard. *Id.* This Court has recognized as much, and has acknowledged that the goals of early termination may not always be accomplished where material facts are disputed. *See Johnson v. Jones*, 515 U.S. 304, 307 (1995) (establishing exception to ordinary rule allowing interlocutory appeals of orders denying qualified immunity where the basis of the denials is a dispute about the underlying facts). Moreover, the complication of material fact disputes is in no way limited to excessive force cases. *See, e.g., Gardenhire v. Schubert*, 205 F.3d 303, 311 (6th Cir. 2000) (observing in wrongful arrest case that some qualified immunity claims cannot be resolved before trial if immunity claim itself turns on disputed facts).

Indeed, while it is not the norm, it is also not uncommon for qualified immunity claims to require some factual findings at the trial stage before they can be resolved. *See, e.g., Martin v. Heideman*, 106 F.3d 1308, 1310-11 (6th Cir. 1997); *Sloman v. Tadlock*, 21 F.3d 1462, 1467 (9th Cir. 1994). Given this precedent, there is little remarkable about the Ninth Circuit's holding, and certainly nothing worthy of this Court's full review.

The fact that in some cases – such as this one – a qualified immunity determination can be made only after resolution of some disputed facts does not, as the County argues, suggest the demise of qualified immunity generally. In fact, this case itself demonstrates the effectiveness

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part of this Court's stated objectives. *Harlow v. Fitzgerald*, 457 U.S. 800, 816-17 (1982). To some degree, those goals may be achieved even by application of the qualified immunity doctrine in later stages of litigation.

of qualified immunity in limiting litigation against government officials. The trial court granted summary judgment to several individual line officers in this case on qualified immunity grounds, a dismissal that the demonstrators did not appeal. The only two individual officers left in the case are Sheriff Lewis and Chief Deputy Sheriff Philp, who not only supervised the line officers but also authorized the use of OC on passive, non-violent demonstrators.

Furthermore, this Court's recent decision in *Saucier v. Katz*, No. 99-1977 (U.S. June 18, 2001), does not alter the issues presented by this case. In *Saucier*, this Court held that it is improper to conflate the analysis of an official's reasonableness under *Graham* with that official's reasonableness for purposes of qualified immunity. *Id.* at 1. The Court indicated that an officer who used an unreasonable level of force under the Fourth Amendment could nonetheless be entitled to qualified immunity. *Id.* at 7-8.

In reaching this conclusion, however, this Court reaffirmed that the relevant inquiry is "whether it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted.*" Slip op. at 6 (citing *Wilson v. Layne*, 526 U.S. 603, 615 (1999)) (emphasis added). Both the determination of whether an officer used excessive force and whether that officer is entitled to qualified immunity remain fact-based inquiries requiring a careful examination of all material facts. When the underlying facts about that situation are themselves in conflict, however, a court may not be capable of quickly resolving a qualified immunity claim in some excessive force cases. This is precisely what occurred below.

As the Ninth Circuit observed in this case, "where essential historical facts concerning what an official knew or did are in dispute, 'it is clear that these are questions of fact for a jury to determine.' " (Pet. App. A at 35a) (citation omitted). Here, many material facts relating

specifically to the qualified immunity claims remain in dispute, precluding their final determination at this point. In contrast, in *Saucier* the Court held that even under the plaintiff's version of the facts a reasonable officer could have believed that the minimal physical contact in that case did not violate the *Graham* standards.[6] Given these fundamental differences in the facts and procedural postures of the two cases, it would make little sense to vacate the Ninth Circuit's decision in this case and remand for reconsideration in light of *Saucier*.

As the Ninth Circuit held below, here there are numerous historical fact disputes relating not only to the amount of force used and the justifications for that force, but also to Sheriff Lewis's and Chief Deputy Philp's supervisory roles in implementing the policy of OC use on passive demonstrators and ensuring it was carried out by their subordinates. (Pet. App. A at 36a, 37a). A careful and fair reading of the Ninth Circuit's decision reveals that this was the central basis of its qualified immunity holding.

The record reveals, for example, that there are fundamental disputes concerning how Lewis and Philp instructed their subordinates to apply OC. Philp testified that he gave instructions discouraging officers from the direct application of OC to the nose and mouth areas and forbidding them to apply it in close proximity to the open eyeball. (Pet. App. A. at 37a). In contrast, the officer in charge at each demonstration testified that Philp and Lewis authorized full spray blasts of OC. ER 4-911-912 (Ciarabellini). These are not peripheral fact disputes, but

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[6] It bears mentioning that the state's asserted interests in *Saucier*, the safety and security of the Vice President of the United States, exceed by leaps and bounds the County's asserted interests in effectuating the arrests of immobilized, non-violent demonstrators. *Saucier v. Katz*, No. 99-1977, slip op. at 13-14 (U.S. June 18, 2001).

evidentiary conflicts that go to the heart of the qualified immunity claim.

Similarly, to the extent that the County relies on facts asserting that Lewis and Philp consulted a county risk manager and the local District Attorney about the use of OC on passive demonstrators, the evidence on the nature and scope of such consultation is in dispute. For example, while there is some evidence that officers consulted with the risk manager about limited applications of OC to cheekbones, the risk manager herself testified that she was never consulted about the types of applications that actually occurred. ER 3-724, 3-729 (Risk Manager Kerr-discussed application below eye, on cheekbone; no discussion of a full spray). The risk manager also disputes the actual extent of any consultation. *Id.*; (Pet. App. A at 38a). In addition, the County presented some evidence that Lewis and Philp were concerned enough about the use of OC in this unprecedented context to ask the District Attorney for an opinion regarding the officers' potential criminal liability, but the evidence also shows that the District Attorney limited the opinion to criminal culpability, and advised them to obtain a separate and independent opinion on the potential civil liability exposure. ER 3-507 (Lewis); ER 5-993, 5-998 (Philp).[7] These facts should also be viewed in light of the fact that the California Highway Patrol specifically prohibits the use of OC in the manner in which the officers used it on the demonstrators. ER 3-518 (Lewis); *cf. Park v. Shiflett*, 250

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[7] In any event, the fact that a public official seeks legal advice is not determinative of whether the law was clearly established at the time of the allegedly unconstitutional act. *See Cannon v. City and County of Denver*, 998 F.2d 867, 874 (10th Cir. 1993); *V-1 Oil Co. v. Wyoming*, 902 F.2d 1482, 1488 n.5 (10th Cir.), *cert. denied*, 498 U.S. 920 (1990). The law was either clearly established, or it was not.

F.3d 843, 852-53 (4th Cir. 2001) (rejecting qualified immunity for officer who sprayed pepper spray in eyes of non-threatening suspect at close range, in violation of department's rules and regulations). Because these disputed facts go directly to the validity of the underlying basis for qualified immunity, early resolution of the qualified immunity claim is simply not possible in this procedural posture.

Finally, the County's representation of a circuit split on the clearly established nature of this Court's excessive force law is misleading. (Pet. at 25-27). The County's citation to cases from different circuits suggests that there is a division with respect to the level of generality at which a clearly established right is articulated. *Id.* Some courts tend to state the right to be free from excessive force more generally, while others state it more closely in relation to the specific facts alleged in the relevant case.

This sets up a false conflict. This Court's cases have always been clear that a plaintiff may not defeat a qualified immunity defense simply by pleading that a clearly established right exists at high level of generality (*e.g.*, a clearly established right to due process of law). *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). *Saucier* reconfirms this. Slip op. at 6. At the same time, the plaintiff need not allege that the precise action in question has previously been declared unconstitutional in order to defeat a qualified immunity claim. *Anderson*, 483 U.S. at 640. No law can be clearly established entirely in the abstract regardless of the factual circumstances. Thus, in order to analyze whether a reasonable officer could have believed his or her conduct violated a clearly established right, a court must always look at the facts that confronted the officer. *Saucier*, slip op. at 11 ("Excessive force claims, like most other Fourth Amendment issues, are evaluated for objective reasonableness based upon the information the officers had when the conduct occurred"). Inconveniently, sometimes those facts are disputed. The Ninth

Circuit's resolution of the qualified immunity claim is perfectly consistent with the Court's instructions on how to administer such claims. The decisions cited by the County are all consistent with this understanding of qualified immunity.

CONCLUSION

The petition for a writ of certiorari should be denied.

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